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No. 71 - 275

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

JOHN ANTONELLO, ET AL.,

Petitioners,

v.

THE CITY OF SAN DIEGO, CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FOURTH DISTRICT, DIVISION ONE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971, No. ____

JOHN ANTONELLO, ET AL.,

Petitioners,

v.

THE CITY OF SAN DIEGO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The Court of Appeal, State of California
Fourth District, Division One

Petitioners pray that a writ of certiorari issue to review the judgment of the California Court of Appeal entered March 19, 1971 affirming a judgment of the Superior Court, County of San Diego, in favor of the Respondent City of San Diego. Petitioners request that on hearing, said judgments be

reversed. After the matter was decided by the State Court of Appeal, Petitioners requested that the matter be considered by the Supreme Court of the State of California, and on May 13, 1971, the Supreme Court of California denied a hearing.

OPINIONS BELOW

No opinion was written by the California Supreme Court in denying the hearing. The opinion of the State Court of Appeal is reported at 16 Cal. App. 3d 161 (March 19, 1971) and a copy is attached hereto.

JURISDICTION

The judgment of the California Supreme Court was entered on May 13, 1971. This Court has jurisdiction under 28 U.S.C.A., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the "peep show" ordinance enacted by the City of San Diego violates the equal protection clause contained in the Fourteenth Amendment to the United States

Constitution.

2. Whether said ordinance is a valid exercise of the police power.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourteenth Amendment, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The City of San Diego enacted an ordinance regulating "peep show establishments." The Petitioners filed an action in the Superior Court, San Diego County, to obtain a judgment holding that the ordinance was invalid on several grounds, including the constitutional point which is cited above. The trial court upheld the validity of the ordinance and this holding was affirmed by the California Court of Appeal and thereafter the California Supreme Court denied a hearing.

REASONS FOR GRANTING THE WRIT

The classification of "peep show

establishments" is an unreasonable classification, thereby violating the rights of the Petitioners to the equal protection of the laws. The right of the Petitioners to operate their establishments in which they display motion pictures is a right protected by the First Amendment to the Federal Constitution, and to single out Petitioners as opposed to regular motion picture theaters and to require more burdensome standards of them is a clear violation of their First Amendment rights and also of their rights under the Fourteenth Amendment to be accorded equal protection of the laws. A copy of the Petition for Hearing filed in the California Supreme Court containing a citation of authorities relied upon by Petitioners and a copy of the Opinion of the California Court of Appeal is attached as Appendix.

CONCLUSION

For the reasons stated above, the Petitioners pray that a writ of certiorari

be issued as prayed for above.

Respectfully submitted,

William F. Gavin

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Attorney for Petitioners

August 11, 1971.

[Proof of Service attached]

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May 18, 1971

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, Civil No. 10200

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ANTONELLO ET AL.

v.

THE CITY OF SAN DIEGO

Appellants' petition for hearing

DENIED.

May 13, 1971.

WRIGHT
Chief Justice

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IN CALIFORNIA SUPREME COURT

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THE SUPREME COURT

STATE OF CALIFORNIA

JOHN ANTONELLO, et al,

Plaintiffs and Appellants,

v.

THE CITY OF SAN DIEGO,

Defendant and Respondent.

APPELLANTS' PETITION FOR HEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of California:

JOHN ANTONELLO and the other appellants hereby respectfully petition this court to set aside the decision rendered by the Court of Appeal on March 19, 1971, and published at 16 C.A. 3d, 161-168 (copy attached) and to grant a hearing in this Court.

The Court of Appeal affirmed the judgment of the Superior Court holding that the ordinance was valid.

GROUNDS FOR HEARING

A hearing in this Court is necessary to settle important questions of Constitutional law. The principal questions are:

(1) Can a municipality ban (in effect) a business, by enacting an ordinance requiring special health and fire safety requirements for that business, when similar requirements are not required of similar businesses.

(2) Can a municipality enact a local ordinance respecting peepshows, where the field of sex regulation is pre-empted by the State?

(3) Is the ordinance a valid exercise of the police power?

(4) Does the ordinance violate the equal protection requirements of the California constitution and the Federal Constitution?

SUMMARY OF FACTS

Plaintiffs own and operate arcades in the City of San Diego, known as "peep show establishments," exhibiting motion pictures observed in a viewing booth, through a small aperture, upon deposit of a coin. The City Council of San Diego, on July 16, 1968, enacted Ordinance No. 9845NS which prescribed standards of construction, maintenance and operation of peep show places of business. It declared the intent and purpose of the Council was to regulate the operation of peep shows "for the protection of the public from the perils of fire, hazards to health, and for the preservation of the peace of the community". It required the use of "not less than one hour fire-resistive material" in the construction of all walls or partitions of rooms or booths, the aisles in any room in which a peep show device is located shall be not less than 42 inches in width. It also required that the light level in all rooms shall be not "less than ten (10) foot candles at

floor level," and that in every room in which a peep show device is located there shall be not less than two lighted exits within the constant and unobstructed view of the occupants. It also provided that the number of persons in any room or partitioned portion of a room where a peep show device is located shall not exceed one person per 30 square feet.

ARGUMENT

I

THE COURT OF APPEAL ERRED IN HOLDING THAT THE ORDINANCE WAS A PROPER EXERCISE OF THE POLICE POWER OF THE CITY OF SAN DIEGO.

We will argue only two parts of the ordinance, in this connection, in order to demonstrate that the ordinance is blatantly unreasonable.

The first is the level of illumination required: ten (10) foot candles at floor level. This is equal to the lobby, but not the auditorium, of a theater.

The second is the requirement of 30 square feet of area for each patron. This area of 30

square feet is, of course, equal to a room five (5) feet wide by six (6) feet long.

II

THE COURT OF APPEAL ERRED IN HOLDING THAT NO QUESTION OF PRE-EMPTION IS INVOLVED.

This turns, of course, on the interpretations given by both lower courts to the holding and dictum of this Court in Burton v. Municipal Court, 68 Cal. 2d 684,689 (1968).

We have no quarrel with this expression by the Supreme Court; we do submit, however, that it was never intended that this Court would intent to approve such a far-reaching extension of its ruling.

III

THE COURT OF APPEAL ERRED IN FINDING THAT THE APPELLANTS WERE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

At the argument of this matter in the Court of Appeal, the appellants submitted two additional authorities to the Court, these being Parr and Carlin:

Parr v. Municipal Court,

3 Cal. 3d 861 (1971),

and

Carlin v. City of Palm Springs,

14 C.A. 3d 706 (1971).

Both of these cases deal with application of the doctrine of equal protection, and in both cases it was held that the ordinances were invalid.

In Parr this Court declared an ordinance of the City of Carmel to be invalid on the ground that it singled out a particular social group for discrimination. The Court found that the social group which was discriminated against were so-called hippies. Accompanying the ordinance was a declaration of urgency which referred specifically to hippies. The plaintiff, Mrs. Parr, however was not a hippy; but was a local merchant who was arrested while sitting on the grass during a public assembly called to discuss the new ordinance. This Court said at page 867:

> "Compared to more sophisticated statutes, subtly concealing their actual motivation, the enactment before us possesses the virtue of

> candor and thus makes our task relatively uncomplicated. We need not look beyond the adopted language of this ordinance to discover its hostile raison d'etre. The description of 'undesirable' and 'unsanitary' persons referred to as 'transients' may not be squared with the claimed neutral purpose of preventing all persons from sitting or lying on the grass in order to protect it from undue wear. But if any doubt remains as to the city council's objective, we need refer only to the explanation of the city's legal spokesman, the city attorney, in the People's bried filed with this court: 'Carmel also urges the court to examine the "historical context and the conditions existing prior to" enactment of the ordinance. We hope the court will not shut its eyes to "matters of public notoriety and general cognizance."'"

In Parr the People had asked this court to ignore the language in this declaration of urgency and to look exclusively to the words of the ordinance. This request was refused by this Court on the ground that it was a proper consideration in a case involving class legislation.

In the present case, it is submitted that the ordinance is improper because it singles out the owners and operators or peep shows and requires extremely burdensome conditions of them without requiring similar conditions of regular motion picture theaters.

In the Carlin case, the Court of Appeal held that an ordinance of the City of Palm Springs was unconstitutional in prohibiting rate signs. The Court held that the classification of signs into rate and non-rate signs was not natural, not intrinsic, and not constitutional. The Court found that the right to advertise freely is an exercise of the right of free speech and that it should be protected by the courts (at page 713). Although the Carlin case was presented to the Court of Appeal herein at the time of argument, no mention of the Carlin case appears in the written opinion of the Court below. It is submitted that the rule of the Carlin case is that the classification must be reasonable and not arbitrary and that if the basis of the classification is economics and esthetics, then the classification is invalid and unconstitutional. The classification in the present case, between peep shows and commercial motion picture theaters, is arbitrary and illegal and for this reason the instant ordinance should be overturned.

SUMMARY AND CONCLUSION

The holdings of the Court of Appeal create a dangerous precedent, in sweeping aside the constitutional arguments advanced by the appellants.

If our Constitutional guarantees are to remain vital and effective, they must be enforced, rather than distinguished away on insubstantial grounds.

The holdings of the Court of Appeal should be set aside and this case should be considered by the Supreme Court.

Respectfully submitted,

William F. Gavin

WILLIAM F. GAVIN
Attorney for Appellants

San Diego, California
April 26, 1971

BEST AVAILABLE COPY

[Civ. No. 10200. Fourth Dist., Div. One. Mar. 19, 1971.]

JOHN ANTONELLO et al., Plaintiffs and Appellants, v. THE CITY OF SAN DIEGO, Defendant and Respondent.

SUMMARY

Owners of "peep show establishments" challenged the validity of a San Diego ordinance regulating the construction and operation of such businesses. The declared intent of the ordinance was to regulate the operation of peep shows to protect the public from fire and health hazards, as well as to preserve the peace of the community. The owners contended the ordinance was unconstitutional because it was intended to prevent the operation of peep shows, a lawful business and one protected by the right of freedom of expression, under the guise of a public safety regulation. They also argued the State had preempted the field of regulation of sexual matters, and they contended the ordinance unconstitutionally discriminated against peep shows as opposed to ordinary theaters. The trial court upheld the validity of the ordinance, finding it to have been precisely limited to the establishment of safety standards and in no way a regulation of sexual activity or an abridgment of freedom of expression. (Superior Court of San Diego County; Eli H. Levenson, Judge.)

The Court of Appeal affirmed the decision. The court held [illegible] court's findings and conclusions to be supported by a considera[tion of the] ordinance on its face, the immediate objective and ultimate [effect of its] regulatory provisions, and the events leading up to its adopti[on. The con]tention the regulatory provisions of the ordinance were unre[asonable and] would close plaintiffs' businesses was rejected in the absen[ce of evidence] indicating compliance with the ordinance would impose a[n unreasonable] burden on peep show owners. In rejecting plaintiffs' equal p[rotection] ment, the court noted material differences between the [operation of] peep shows and of theaters, which were sufficient to [make the] ment of peep shows reasonable. (Opinion by Coughlin, [P. J., with] Thompson and Brault, JJ., concurring.)

HEADNOTES

Classified to McKinney's Digest

(1a, 1b) **Municipal Corporations §§ 236.6, 237(5)—Ordinances—Validity—Impairment of Freedom of Speech: Entire Field Occupied by General Law.**—Contentions an ordinance regulating the construction and operation of "peep show establishments" was intended to prevent the operation of such businesses and was a local regulation of sexual matters, a field preempted by the state, were without merit, where a consideration of the ordinance on its face, of the immediate objectives and ultimate effect of its regulatory provisions, and of the events leading up to its adoption supported the conclusion the ordinance was limited to the establishment of safety standards and was in no way a regulation of sexual activity.

(2a, 2b) **Municipal Corporations § 236.5—Ordinances—Validity—Impairment of Contract Rights.**—The fact it may be costly to conform to the requirements of an ordinance does not necessarily make such ordinance oppressive or confiscatory; thus, an ordinance regulating the construction and operation of "peep show establishments" was not invalid as an imposition of unreasonable restraints upon a lawful business or an attempt to prevent the operation of such establishments, in the absence of evidence showing compliance would impose an unreasonable burden upon peep show owners.

[See Cal.Jur.2d, Municipal Corporations, § 247 et seq.]

(3) **Constitutional Law § 102—Police Power—Occupations.**—A lawful business may not be destroyed under the guise of regulation, but the manner of its operation may be subject to regulation reasonably necessary to promote the public health, safety and general welfare, even though compliance with such regulation is burdensome.

(4) **Constitutional Law § 116(3)—Freedom of Expression—Limitation on Right.**—The constitutional right to operate "peep shows" in which motion pictures are observed in a viewing booth, through a small aperture, upon deposit of a coin, did not guarantee the right to operate them in places and under conditions detrimental to the public health, safety and welfare, but rather the premises upon which such businesses were operated were subject to reasonable regulation by a municipality under the police power.

(5) **Constitutional Law § 61—Constitutionality of Statutes—Inquiry Into Motives of Legislature.**—Where the purpose of a statute is relevant to a determination of its constitutional validity, a court, to ascertain such purpose, may examine its immediate objective and ultimate effect as well as events leading up to its passage, but since a statute effecting a valid purpose is valid regardless of the motives actuating its enactment, a court may not examine the motives influencing legislators in voting for the statute.

(6) **Constitutional Law § 107—Police Power—Legislative Discretion and Court Review.**—In reviewing a statute alleged to be an improper exercise of the police power, the inquiry of the court is limited to determining whether the object of the statute is one for which that power may legitimately be invoked, and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained.

(7) **Municipal Corporations § 127—Scope and Subjects of Police Power—Occupations and Businesses.**—Under the police power a municipality may impose regulations upon the construction and maintenance of business premises reasonably necessary to protect the health, safety and general welfare of patrons of the business and other members of the public; and the determination of a need for such regulation and for the type of regulation necessary to meet that need must not be set aside or disregarded by the courts unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice.

(8) **Municipal Corporations § 117—Police Power—Reasonableness and Uniformity; Constitutional Law § 156(4)—Equal Protection of Laws—Reasonableness of Classification.**—An ordinance enacted under the police power, imposing burdens upon a class of persons, does not violate the equal protection guaranty of the federal and state Constitutions if it applies equally to all persons within the class, and if the classification is founded upon some natural, intrinsic or constitutional distinction which bears a rational relationship to the purpose the ordinance is intended to serve; in creating such a classification the legislative body is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident; thus, an ordinance regulating the construction and operation of "peep show" establishments," which differ materially from ordinary theaters regarding their particular needs for the protection and escape of patrons in case of fire, was not unconstitutionally

discriminatory in imposing greater burdens on peep shows than on ordinary theaters.

COUNSEL

William F. Garin for Plaintiffs and Appellants.

John W. Witt, City Attorney, and William H. Kronberger, Jr., Deputy City Attorney, for Defendant and Respondent.

OPINION

COUGHLIN, Acting P. J.—Plaintiffs appeal from a judgment declaring valid a city ordinance regulating the construction and operation of "peep show establishments."

Plaintiffs own and operate arcades in the City of San Diego, known as "peep show establishments," exhibiting motion pictures observed in a viewing booth, through a small aperture, upon deposit of a coin. The City Council of San Diego, on July 16, 1968, enacted Ordinance No. 9845NS which prescribes standards of construction, maintenance and operation of peep show places of business; declares the intent and purpose of the council is to regulate the operation of peep shows "for the protection of the public from the perils of fire, hazards to health, and for the preservation of the peace of the community"; requires the use of "not less than one hour fire-resistive material" in the construction of all walls or partitions of rooms or booths, the aisles in any room in which a peep show device is located shall be not less than 42 inches in width, the light level in all rooms shall be not "less than ten (10) foot candles at floor level," and in every room in which a peep show device is located there shall be not less than two lighted exits within the constant and unobstructed view of the occupants; and provides the number of persons in any room or partitioned portion of a room where a peep show device is located shall not exceed one person per 30 square feet.

(1a, 2a) Plaintiffs contend the ordinance is unconstitutional because it (1) is intended to prevent the operation of peep shows under the guise of regulation providing for the public health, safety and general welfare; (2) is municipal legislation in a field preempted by the state; (3) is an unreasonable exercise of the police power in that its provisions are not intended to effect a valid police power objective and impose unreasonable

restraints upon a lawful business; and (4) violates the equal protection of the law guarantee of the federal and state Constitutions by an unlawful classification of and discrimination against peep show operators.

Plaintiffs' case, as made out by their brief on appeal, is premised upon the implied assertion the motion pictures exhibited in their establishments concern "sexual activity" or "sexual matters"; upon the claim the real purpose of the ordinance is to "close down" their establishments because of the subject matter of the motion pictures exhibited by them; upon the further claim their right to exhibit these motion pictures is protected by the constitutional guarantee of freedom of speech as held in *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 499 [96 L.Ed. 1098, 1104, 72 S.Ct. 777, 779]; *Burton* v. *Municipal Court,* 68 Cal.2d 684, 689 [68 Cal.Rptr. 721, 441 P.2d 281]; *Flack* v. *Municipal Court,* 66 Cal.2d 981, 988 [59 Cal.Rptr. 872, 429 P.2d 192]; and also upon the claim regulation of "sexual activity" or "sexual matters," which assertedly is the purpose of the ordinance, is legislation in a field preempted by the State under the holding in the case of *In re Lane,* 58 Cal.2d 99 [22 Cal.Rptr. 857, 372 P.2d 897].

It is appropriate to note, in numerous instances the arguments advanced by plaintiffs in support of their contentions are premised on assumed facts; in some instances on facts the court found did not exist; and in other instances on general conclusionary statements premised on conjecture and surmise respecting the effect of the ordinance. By way of example, plaintiffs assert the real purpose of the ordinance and its resulting illegality "may be readily inferred from the results which would naturally flow from its enforcement," but "the results" in question are not specified nor is there reference to any evidence upon which to premise the conclusion advocated; argue the ordinance is an attempt to regulate "sexual matters" under the guise of a health and safety regulation but it is not shown how the ordinance effects this disguised purpose; and assume the affected peep shows are engaged in "sexual activity" within a field of legislation preempted by the state whereas there is no proof respecting either the type of "sexual activity" in which they engage, or the subject matter of the pictures displayed.

The overriding issue presented by plaintiffs' contentions is whether the purpose of the ordinance is to prevent the operation of peep shows or to protect the health, safety and general welfare of the public by prescribing conformance to designated standards of construction and operation.

(3) It is fundamental a lawful business may not be destroyed under the guise of regulation. (*Ex parte Hayden,* 147 Cal. 649, 650 [82 P. 315]; gen. see 11 Cal.Jur.2d 343, 345.) On the other hand, the manner of its operation may be subject to regulation reasonably necessary to promote the public health, safety and general welfare, even though burdensome,

(*Serve Yourself Gas etc. Assn.* v. *Brock*, 39 Cal.2d 813, 819 [249 P.2d 545]; *Hart* v. *City of Beverly Hills*, 11 Cal.2d 343, 345 [79 P.2d 1080].)

(4) The fact plaintiffs constitutionally may be guaranteed the right to operate peep shows of the type they operate does not constitutionally guarantee the right to operate them in places and under conditions detrimental to the public health, safety and welfare. (*Burton* v. *Municipal Court, supra*, 68 Cal.2d 684, 689 [68 Cal.Rptr. 721, 441 P.2d 281]; *Serve Yourself Gas etc. Assn.* v. *Brock, supra*, 39 Cal.2d 813, 819 [249 P.2d 545]; *In re Porterfield*, 28 Cal.2d 91, 101 [168 P.2d 706, 167 A.L.R. 675].) To the contrary, the premises upon which plaintiffs engage in business, even though utilized for the exercise of First Amendment rights, are subject to reasonable regulation under the police power. (*Burton* v. *Municipal Court, supra*, 68 Cal.2d 684, 690.)

(5) Where the purpose of a statute is relevant to a determination of its constitutional validity a court, to ascertain such purpose, may examine its immediate objective and ultimate effect as well as events leading up to its passage (*Parr* v. *Municipal Court*, 3 Cal.3d 861, 863, 866 [92 Cal.Rptr. 153, 479 P.2d 353]; *Mulkey* v. *Reitman*, 64 Cal.2d 529, 533 [50 Cal.Rptr. 881, 413 P.2d 825]), but not the motives influencing legislators in voting its passage. (*United States* v. *O'Brien*, 391 U.S. 367, 383 [20 L.Ed.2d 672, 683, 88 S.Ct. 1673, 1682]; *Serve Yourself Gas etc. Assn.* v. *Brock, supra*, 39 Cal.2d 813, 819; *Simpson* v. *City of Los Angeles*, 4 Cal.2d 60, 65 [47 P.2d 474].) A statute effecting a valid purpose is valid regardless of the motives actuating its enactment. (*United States* v. *O'Brien, supra*, 391 U.S. 367, 383 [20 L.Ed.2d 672, 683, 88 S.Ct. 1673, 1682]; *Simpson* v. *City of Los Angeles, supra*, 4 Cal.2d 60, 65.)

(1b) The trial court found and concluded the ordinance "is precisely limited to the establishment of fire, health and safety standards and in no way, directed or indirectly, regulates the subject matter of material presented in peep show establishments"; "is in no way, directly or indirectly, a regulation of sexual activity"; "in no way abridges freedom of expression within the meaning of the First and Fourteenth Amendments to the Constitution"; and "is not preempted by State or Federal laws relating to freedom of expression or sexual activity." These findings and conclusions are supported by a consideration of the ordinance on its face, the immediate objective and ultimate effect of its regulatory provisions, and the events leading up to its adoption. Plaintiffs' contentions to the contrary are without merit.

(6) Where, as in the case at bench, it is urged "a statute does not constitute a proper exercise of the police power, the inquiry of the court is limited to determining whether the object of the statute is one for which that

power may legitimately be invoked and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained." (*Allied Properties* v. *Dept. of Alcoholic Beverage Control*, 53 Cal.2d 141, 146 [346 P.2d 737].)

(7) It is elementary, under the police power a municipality may impose regulations upon the construction and maintenance of business premises reasonably necessary to protect the health, safety and general welfare of patrons of the business and other members of the public. (*Matter of Stoltenberg*, 165 Cal. 789, 791 [134 P. 971]; *Ex parte Fiske*, 72 Cal. 125, 127 [13 P. 310]; *Sullivan* v. *City of Los Angeles*, 116 Cal.App.2d 807, 810 [254 P.2d 590]; *Matter of Application of Stoltenberg*, 21 Cal.App. 722 [132 P. 841].) The determination by a legislative body of a need for police power regulation and the type of regulation necessary to meet that need "must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice." (*Matter of Application of Miller*, 162 Cal. 687, 696 [124 P. 427]; *Allied Properties* v. *Dept. of Alcoholic Beverage Control, supra*, 53 Cal.2d 141, 148; *Southern Pac. Co.* v. *Railroad Com.*, 13 Cal.2d 89, 121 [87 P.2d 1055]; *Justesen's Food Stores* v. *City of Tulare*, 43 Cal.App.2d 616, 621 [111 P.2d 424].) (2b) Plaintiffs' contention the regulatory provisions of the ordinance are unreasonable and will "close down" their business is without support in law or in fact. There is no showing compliance with the ordinance will impose an unreasonable burden upon peep show owners. Obviously compliance will be more costly than noncompliance, however, an ordinance "does not become oppressive or confiscatory by reason of the fact that it may be more costly to conform to its requirements." (*Serve Yourself Gas etc. Assn.* v. *Brock, supra*, 39 Cal.2d 813, 819.)

(8) In support of their contention the ordinance violates the equal protection of the law guarantee of the federal and state Constitutions, plaintiffs claim the classification of peep show establishments as subjects for the regulations imposed is not reasonably related to the purpose of the ordinance and is discriminatory in that it imposes on peep shows greater burdens than on ordinary theaters.

An ordinance, enacted under the police power, imposing burdens upon a class of persons does not violate the equal protection guarantee providing it applies equally to all persons within the class, and the classification is founded upon some natural, intrinsic or constitutional distinction which bears a rational relationship to the purpose the ordinance is intended to

serve. (*Parr* v. *Municipal Court, supra,* 3 Cal.3d 861, 864; *Werner* v. *Southern Cal. etc. Newspapers,* 35 Cal.2d 121, 130 [216 P.2d 825, 13 A.L.R.2d 252]; *Leland* v. *Lowery,* 26 Cal.2d 224, 232 [157 P.2d 639, 175 A.L.R. 1109].) In creating such a classification the legislative body "is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident." (*Board of Education* v. *Watson,* 63 Cal.2d 829, 833 [48 Cal.Rptr. 481, 409 P.2d 481].) Peep show establishments differ materially from other business establishments, including theaters, regarding particular needs for the protection of their patrons, as demonstrated by the physical setup of their premises consisting of individual booths located in close quarters where a fire in one booth, unless contained, would spread readily to other booths and, in any event, would create unusual demands upon escape facilities requiring particular regulations respecting lighting conditions, size of aisles and number of exits. Safety precautions also require limitation upon the number of occupants of such an establishment to insure the escape of all therefrom in the event of a fire. The classification in question was not unreasonable, arbitrary or discriminatory. (Gen. see *Matter of Stoltenberg, supra,* 165 Cal. 789; *Ex parte Fiske, supra,* 72 Cal. 125, 127; *Sullivan* v. *City of Los Angeles, supra,* 116 Cal.App.2d 807, 810; *Matter of Application of Stoltenberg, supra,* 21 Cal.App. 722, 724.)

The judgment is affirmed.

Whelan, J., and Ault, J., concurred.